IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.83 OF 1996
IN
NOTICE OF MOTION NO.1164 OF 1995
IN
S.C.SUIT NO.8141 OF 1992

1) Roshanlal Agarwal)
2) Narendra Gupta)
3) Anil R. Agarwal)
all of Bombay, Indian Inhabitants)
having their office at RNA House)
3rd Floor, Veer Nariman Road)
Fort, Bombay 400 023.)
4) M/s.East and West Builders)
a registered partnership firm)
having its office at RNA House)
3rd Floor, Veer Nariman Road)
Fort, Bombay 400 023.).. Appellants
(Org.Defendants)

Versus

Kalavati Baljor Yadav)
of Bombay, Indian Inhabitant)
residing at Talaopada, S.No.92)
CTS No.285, Bandar Pakhadi)
Kandivli (W), Bombay 400 067.).. Respondent
(Org.Plaintiff)

Mr.M.M.Vashi with Mr.Y.M.Chaudhari for the Appellants.

Mr.M.R.Yadav for the Respondent.

CORAM: SMT.NISHITA MHATRE, J.

DATED: 6TH OCTOBER 2004

ORAL JUDGMENT :

. This Appeal From Order has been filed against the order dated 16th March 1995 rejecting the Motion taken out by the Defendants for setting aside the

ex-parte decree as well as the ex-parte order in the Motion. It is the case of the Appellants that the Notice of Motion was made absolute on 18th April 1994 when both the parties and their Advocates were absent. The roznama which has been filed in this Court indicates that although the Defendants were represented through an Advocate, no reply had been filed to the Motion and an ad-interim injunction was running against the Defendants since 18th December 1992. Accordingly, the trial Court made Notice of Motion No.6935 of 1992 absolute in terms of the order passed on 18th December 1992. It appears thereafter the Suit came up for hearing on 7th November 1994 when both parties and their Advocates were absent. On 17th January 1995 the Advocate for the Plaintiff was present. The trial Court has by a cryptic order decreed the Suit. The roznama states as follows :-

> "Suit is on apprehension. Service complete. Decree in terms of prayer (a). No order as to costs."

2. The Appellants immediately thereafter moved the Notice of Motion for setting aside the ex-parte decree. This Motion was filed on 28th February 1995. An affidavit in support of the Motion discloses that it was due to the absence of the Advocate for the Defendants that the matter was proceeded with ex-parte. An affidavit has also been filed by the Advocate on record

for the Defendants who has averred that he was required to attend a matter in the Supreme Court on 17th January 1995 and had requested his colleague to attend the matter. Unfortunately, the other Advocate missed the matter and did not attend the Court. Accordingly, in the absence of the Defendants as well as their Advocate, the Suit was decreed.

3. Mr.Vashi, learned Advocate for the Appellants-Defendants, submits that the Defendants have made out a justifiable case for setting aside the ex-parte decree. He submits that the order of 17th January 1995 is incomprehensible since it is neither passed under Order 8 Rule 5 nor is it passed under Order 9 Rule 11 of the Civil Procedure Code. According to him, it was necessary for the learned trial Judge to consider the contentions raised in the Plaint and then to decide whether the Suit should be decreed, even though an ex-parte decree was being passed. No such procedure has been followed by the trial Court. He further submits that the Defendants be put to terms and the ex-parte decree be set aside and the Suit be allowed to be heard on merits. Mr.Vashi fairly stated that he is not agitating against the ex-parte order dated 18th April 1994 making the Notice of Motion absolute.

4. As against this, Mr.Yadav, learned Advocate for

the Respondent-Plaintiff, submits that the ex-parte decree has been passed under Order 8 Rule 5 of the Civil Procedure Code and, therefore, no Motion could have been taken out for setting aside the ex-parte decree. It is only a First Appeal which would lie for impugning the decree passed on 17th January 1995. He submits that there is a delay in filing the Motion for setting aside the ex-parte decree since it has not been filed within thirty days. He further submits that since there is no prayer made for condoning the delay, the Motion itself is not maintainable. He further urges that no orders should be passed in this Appeal since the original Plaintiff has already moved the trial Court under Order 21 Rule 22 for execution of the ex-parte decree and, therefore, the Appeal itself has become infructuous.

5. Heard Advocates. The record of the Court discloses that after the Appeal was admitted, the matter had come up on board on a couple of occasions when it was adjourned since nobody appeared for the Respondent. In fact, this Court was pleased to direct the Appellants to give notice to the Respondent in order that the Appeal be heard finally. Even yesterday i.e. on 5th October 2004 nobody appeared in the matter on behalf of the Respondent and hence it was kept today for hearing. Furthermore, the application for execution under Order 21 Rule 22 has been filed only on 6th July 2004 despite

there being a decree in favour of the Respondent since 1995. Obviously, this has been done in order to avoid hearing of the present Appeal From Order.

6. The ex-parte decree passed on 17th January 1995 discloses no application of mind by the trial Court, much less a consideration of the Plaint before the Court. Furthermore, the affidavit in support of the Notice of Motion indicates that the Advocate for the Appellants-Defendants was not able to attend and he had requested his colleague to attend the matter. It appears that the other Advocate was not able to attend the matter for various reasons. In my view, the negligence of an Advocate should not in any way cause prejudice to the litigants. There is sufficient cause made out for setting aside the ex-parte decree.

7. The submission of Mr.Yadav for the Respondent that there is no prayer for condoning the delay and that only a First Appeal would lie against the decree cannot be accepted. The decree does not disclose definitely whether it has been passed under Order 8 Rule 5 in order to obviate the filing of the Motion for setting aside the ex-parte order. Furthermore, sufficient reasons were made for condoning the delay. I do not see any reason why the ex-parte decree should not be set aside. However, in the facts and circumstances of the case, I

find that there is no doubt that the Appellants have been negligent in following up the proceedings and they have been absent on several occasions. Therefore, the Appellants must be put to some terms for setting aside the ex-parte decree.

8. Hence, the ex-parte decree dated 17th January 1995 is set aside on payment of costs as condition precedent. Costs quantified at Rs.7,500/- (Rupees Seven Thousand Five Hundred only).

9. Parties to appear before the trial Court on 18th October 2004. Appellants to file the Written Statement within two weeks from today. Suit to be disposed of as expeditiously as possible and in any event within six months.

10. The order passed in the Notice of Motion on 18th April 1994 will continue during the pendency of the Suit.

11. Appeal From Order disposed of accordingly.

12. In view of the disposal of the Appeal From Order, nothing survives in Civil Application No.1077 of 2004 and the same is disposed of accordingly.